16-668

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1146.

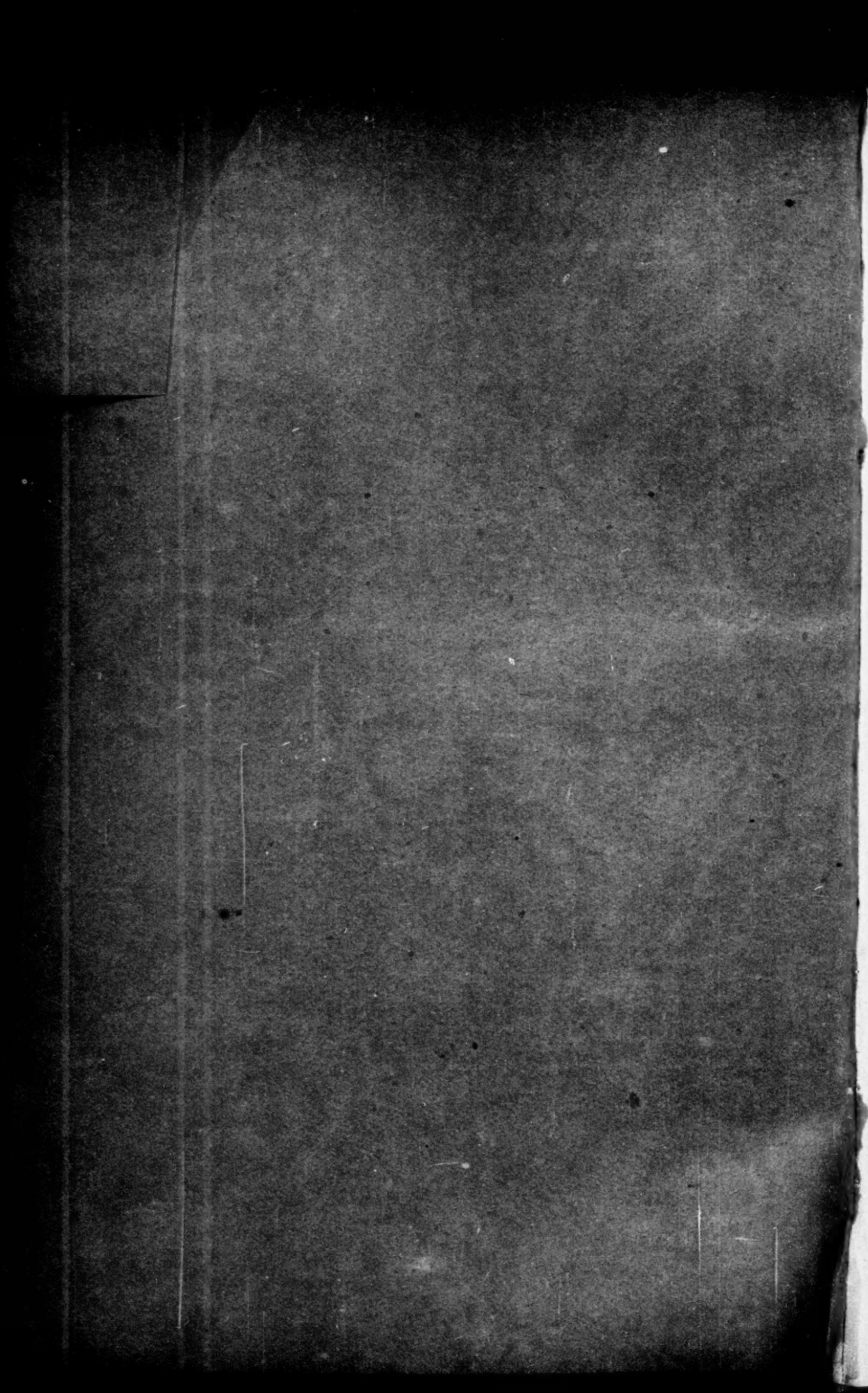
THE COUNTY OF KANKAKEE, PLAINTIFF IN ERROR,

vs.

THE ÆTNA LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 6, 1882.



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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Wednesday, the fourth day of October, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

WM. H. BRADLEY, *Clerk.*

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE COUNTY OF KANKAKEE. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourteenth day of September, A. D. 1881, came the plaintiff, by its attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its præcipe for a writ of summons, bond for costs, and declaration in said entitled cause, which said præcipe, bond, and declaration are respectively in the words and figures following, to wit:

2 *Præcipe.*

Circuit court, United States of America, northern district of Illinois, ss.
October term, A. D. 1881.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE COUNTY OF KANKAKEE. } In assumpsit. Dam. $6,000.

The clerk will issue summons in the above-entitled cause directed to the marshal of said district.

BAILEY & SEDGWICK,
Plaintiff's Attorney.

PEORIA, *Sept.* 13, 1881.

(Endorsed:) Filed Sept. 14, A. D. 1881. W. H. Bradley, clerk.

Bond for costs.

Circuit court, United States of America, northern district of Illinois, ss.
October term, A. D. 1881.

THE ÆTNA LIFE INSURANCE COMPANY
vs.
THE COUNTY OF KANKAKEE. } In assumpsit.

3 I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to

any of the officers of this court, in pursuance of the laws of this State and of the United States. Dated this 14th day of September, 1881.

O. J. BAILEY.

(Endorsed:) Filed Sept. 14, A. D. 1881. W. H. Bradley, clerk.

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States circuit court of said district. October term, A. D. 1881.

The Aetna Life Insurance Company, of Hartford, Connecticut, and a citizen of the State of Connecticut, plaintiff in this suit, by Bailey & Sedgwick, its attorneys, complains of The County of Kankakee, in the State of Illinois, the defendant, a citizen of the State of Illinois, summoned, &c., to answer said plaintiff in an action of trespass on the case on promises, for that whereas the said plaintiff is, and for many years last past has been, the bona fide owner and holder of twenty-five instruments
4 in writing, commonly called municipal bonds, executed and issued together with their attached coupons by said defendant, at, to wit, the district aforesaid, on, to wit, September 20th, A. D. 1870, numbered respectively from 61 to 85 inclusive, bearing date on, to wit, said last-mentioned day and year, each of which is a promise to pay the Kankakee and Illinois River Railroad Company, or the bearer thereof, the sum of one thousand dollars, at the Fourth National Bank, New York, to wit, at the district aforesaid, with interest at ten per cent. per annum, payable annually on presentation and surrender of said annexed coupons therefor, the principal of said bonds, numbered from 61 to 70 inclusive, payable and due July 1st, 1890; of those numbered 71 to 80 inclusive payable and due July 1st, 1891; of the balance payable and due July 1st, 1892, all of which said bonds and coupons were so executed and issued, delivered, and put in circulation by said defendant under and pursuant to orders of the board of supervisors thereof for subscription to the capital stock of said railroad company, as authorized by virtue of the laws of the State of Illinois authorizing cities and counties to subscribe to the capital stock to aid and construct railroads, also in accordance with
5 the provisions of an act of said State of Illinois, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, A. D. 1869, as is recited on the face of each of said bonds, and also in pursuance of a vote of the people of said county, in accordance with said laws prior to July 1st, 1870, and afterwards, to wit, January 1st, 1871, became the property as aforesaid of said plaintiff, to wit, at the district aforesaid, who then and there purchased the same in the usual course of its business for a valuable consideration, to wit, a sum of money equal to the principal and their accrued interest thereof, and in good faith, without notice of any possible defence thereto, and relying on said recitals in said bonds.

And whereas said plaintiff heretofore, to wit, on the first day of Sep-

tember, A. D. 1881, at, to wit, the district aforesaid, was and still is the owner and holder of fifty of the above-mentioned interest coupons, due and payable at the 4th Nat'l Bank, New York, to wit, at the district aforesaid, twenty-five thereof July 1st, A. D. 1880, for the interest on said bonds then due, and twenty-five thereof July 1st, A. D. 1881, for the interest on said bonds then due, each thereof being a promise by said defendant to pay the bearer thereof one hundred dollars at the time
6 when it became due as aforesaid, and executed by said defendant by Wm. F. Kenaga, its county clerk, thereto duly authorized by said defendant; by means whereof, and by force of the statutes in such case made and provided, the said defendant became and was then and there indebted to the said plaintiff in an amount equal to the amount of said sums of money mentioned in said coupons and interest thereon, to wit, the sum of six thousand dollars, and in consideration thereof then and there undertook and promised the plaintiff to pay it, said last-mentioned sum of money, when thereunto requested.

And whereas also the said defendant afterwards, to wit, on the 1st day of September, A. D. 1881, at, to wit, the district aforesaid, became and was indebted to said plaintiff in the further sum of, to wit, six thousand dollars, for money before that time lent and advanced to, and paid, laid out, and expended for said defendant by said plaintiff at said defendant's request, and for money before that time had and received by said defendant to and for the use of said plaintiff, and also in the like sum for interest due the plaintiff from the defendant for divers sums of money before that
7 time forborne to the defendant by the plaintiff at the special instance and request of the defendant, and also in the like sum for other moneys found due the plaintiff from the defendant on a statement of account between them, and being so indebted the said defendant in consideration thereof then and there undertook and promised the plaintiff to pay it, said several sums of money, when thereunto requested. Yet the said defendant, though often thereunto by the plaintiff requested, has not paid the plaintiff said sums of money, or either or any part thereof, but so to do has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of said plaintiff in the sum of six thousand dollars, and therefore it brings suit.

By BAILEY & SEDGWICK,
Pl'f't's Att'ys.

Copy of instruments and account sued on.

$100. The County of Kankakee, State of Illinois, will pay the bearer hereof one hundred dollars on the first day of July, A. D. 1880, at 4th Nat'l Bank, New York, being interest due on railroad bond No. .

WM. F. KENAGA, *County Clerk.*

There are 25 instruments in form as above, in each of which a bond, No. , is inserted, said Nos. being 61 to 85 respectively.

Also 25 other instruments in form as below, same bond Nos.

8 $100. The County of Kankakee, State of Illinois, will pay the bearer hereof one hundred dollars on the first day of July, A. D. 1881, at 4th Nat'l Bank, New York, being interest due on railroad bond No. .

The County of Kankakee to the Ætna Life Ins. Co., Dr.

To money lent & advanced	$6,000
" " paid, laid out & expended	$6,000
" " had & received	$6,000
" " interest	$6,000
" bal. due on % stated	$6,000

(Endorsed:) Filed Sept. 14, 1881. W. H. Bradley, cl'k.

On the same day, to wit, on the fourteenth day of September, A. D. 1881, there issued out of said clerk's office a writ of summons in said entitled cause, which said summons, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

9 We command you to summon the County of Kankakee, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto The Ætna Life Insurance Company of a plea of trespass on the case upon promises to its damage, as it is alleged, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 14th day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the 106th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

Marshal's return.

I have served the within summons by reading the same to Ira C. Mosier, chairman of the board of supervisors of Kankakee County, Illinois, and by delivering a true copy of this writ on the 20th day of September,
10 and by reading the same to William F. Kanago, county clerk of Kankakee County, Illinois, on the 20th day of September, 1881.

A. M. JONES,
U. S. Marshal,
By R. D. SHERMAN, *D'p't.*

(Endorsed:) Filed Oct. 1, A. D. 1881. W. H. Bradley, clerk.

Afterwards, to wit, on the twenty-ninth day of September, A. D. 1881, came the defendant, by its attorney, and filed in said clerk's office its plea, and also at the same time filed the affidavit of Ira C. Mosier in said entitled cause, which said plea and affidavit are in the words and figures following, to wit:

Plea.

Circuit court of the United States, northern district of Illinois, October term, A. D. 1881.

COUNTY OF KANKAKEE
ads.
THE AETNA LIFE INSURANCE COMPANY. } Gen. No. 17578. Plea.

And the said defendant, by F. H. Kales, its attorney, comes and
11 defends the wrong and injury when, &c., and saith that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country.

F. H. KALES,
Att'y for said Defendant, County of Kankakee.

Affidavit of Ira C. Mosier.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof, October term, A. D. 1881.

THE AETNA LIFE INS. CO.
vs.
THE COUNTY OF KANKAKEE.

Ira C. Mosier, being duly sworn, says he is the chairman of the board of supervisors of the County of Kankakee, the defendant in the above suit mentioned.

And this deponent further saith that the said instruments of writing sued on were not, as he verily believes, made, executed, or authorized by the said defendant.

And this deponent further saith that the said plea of the said defendant is, as he verily believes, true.

And further this deponent saith not, etc.

12 IRA C. MOSIER,
Chairman of Board of Supervisors of Kankakee Co.

Subscribed and sworn to before me this 27th day of Sept., A. D. 1881.
[SEAL.] PERRY H. SMITH, JR.,
Notary Public.

(Endorsed:) Filed Sept. 29, 1881. W. H. Bradley, cl'k.

Afterwards, to wit, on the fourth day of October, in the adjourned October term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

THE AETNA LIFE INSURANCE COMPANY
vs.
THE COUNTY OF KANKAKEE. } Assumpsit.

Now come the parties by their attorneys, and upon issue joined by agreement of the parties by their attorneys they waive the intervention of a jury, and for trial put themselves upon the court, and,
13 after hearing the evidence, the court finds the issue for the plaintiff, and assesses its damages to the sum of five thousand five hundred and twenty-five dollars. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of five thousand five hundred and twenty-five dollars, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to thirty dollars and one cent.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

14 *Bill of exceptions.*

THE UNITED STATES OF AMERICA,
Northern District of Illinois:

At a circuit court of the United States begun and held at Chicago, in the northern district of Illinois, on the 4th day of October, A. D. 1882.

Present, the honorable Henry W. Blodgett, judge of the district court of said district, sitting as circuit judge; and a jury having been waived by written stipulation filed with the clerk pursuant to the statute, this cause was then heard, tried, and determined by the court, to wit:

THE AETNA LIFE INSURANCE COMPANY
vs.
THE COUNTY OF KANKAKEE. } Bill of exceptions.

This is a suit in assumpsit brought upon fifty (50) certain coupons attached to twenty-five (25) certain bonds made by the County of Kankakee, in the State of Illinois, in the following form, except as to
15 the numbers thereof and the time when due, to wit:

No. 70.] UNITED STATES OF AMERICA. [$1,000.

STATE OF ILLINOIS, KANKAKEE COUNTY,

Ten per cent. railroad bond.

Know all men by these presents that the County of Kankakee, State of Illinois, acknowledges itself to owe and be indebted to the Kankakee and Illinois River Railroad Company, or bearer, in the sum of one thousand dollars, which sum the said County of Kankakee promises to pay at the Fourth National Bank, New York, on the first day of July, A. D.

1890, with interest at ten per cent. per annum, payable annually on presentation and surrender of the annexed coupons.

This bond is one of a series of one hundred bonds numbered from one to one hundred, inclusive, for one thousand dollars each, & payable from 13 to 23 years from the date hereof in sums of ten thousand dollars each year, and is issued under and pursuant to orders of the board of supervisors of Kankakee County, Illinois, for subscription to the capital stock of the Kankakee and Illinois Railroad Company, as authorized
16 by virtue of the laws of the State of Illinois authorizing cities and counties to subscribe capital stock to aid and construct railroads; also in accordance with the provisions of an act of said State of Illinois entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, A. D. 1869.

In testimony whereof the said County of Kankakee has executed this bond by causing the chairman of the board of supervisors to subscribe his name hereto and to be countersigned by the clerk of this county and affixing the seal of said county; all of which is done at the city of Kankakee, Illinois, by and under the order of the board of supervisors of Kankakee County, this the 20th day of September, A. D. 1870.

{ SEAL OF COUNTY COURT } { OF KANKAKEE COUNTY. }

IRA C. MOSIER,
Chairman of the Board of Supervisors.

Countersigned by—

WM. F. KENAGA,
Clerk of the County Court.

COUPON.

$100. The County of Kankakee, State of Illinois, will pay the bearer hereof one hundred dollars on the first day of July, A. D. 1882, at the 4th National Bank, New York, being interest due on railroad bond No. 70.

WM. F. KENAGA,
County Clerk.

17 The defendant pleaded the general issue with an affidavit appended of the chairman of the board of supervisors, stating upon his belief that said plea is true, and that said bonds and coupons were not, as he believes, made or authorized by the defendant, on which plea plaintiff joined issue.

The case coming on to be heard before said court upon written stipulation as aforesaid, the said coupons described in the declaration were introduced in evidence, and the aggregate amount thereof, at the time of the trial, was, with interest according to their tenor and effect, the sum of five thousand five hundred and twenty-five dollars of lawful money.

And the evidence further tending to show that the said plaintiff purchased and received the said bonds and the interest coupons thereto attached from previous bona fide purchasers in open market, and that said plaintiff purchased the same for value paid in good faith before due and without any notice of any defect in or defence to the same before the
18 maturity thereof, and that the said bonds are numbered from sixty-one to eighty-five, both inclusive.

And evidence was further introduced tending to show that the signatures to the said bonds and coupons are the genuine signatures of the persons purporting to sign them, as the chairman of the board of supervisors of said county, and the county clerk of the county court of said county, such clerk being clerk of said county court and ex-officio county clerk and clerk of said board, and that said persons were, when they executed and delivered said bonds and coupons, such officers.

That further evidence was introduced to show that said Kankakee and Illinois River Railroad Company, mentioned in said bonds, was incorporated by an act of the general assembly of the State of Illinois entitled "An act to incorporate the Kankakee and Illinois River Railroad Company," in force April 15, 1869.

And further evidence was introduced showing the following proceedings of the said board of supervisors of the said county of Kankakee, to wit:

That the board of supervisors of said Kankakee County, at a meeting thereof regularly held on May 6, 1869, adopted the following resolution and call for an election to be held under an act of the legislature of the State of Illinois, entitled an act supplemental to an act entitled "An act to provide for a general system of railroad corporations," in force November 6, 1849, and a petition from the requisite number of citizens of that county for that purpose, having been presented to said board, to wit:

Resolution relative to the taking of stock in the Kankakee and Illinois River Railroad Company.

Mr. McGrew presented the following:

Whereas the Kankakee and Illinois River Railroad Company propose constructing a railroad from the State line between the States of Indiana and Illinois through the incorporate limits of the town of Momence and the city of Kankakee, in Kankakee County and State of Illinois, and thence through Dwight and Streator, to connect with the Rock Island Railroad at Bureau Junction, or at some other point on said Rock Island Railroad to be hereinafter determined.

Also whereas said railroad company require aid in the construction of said railroad, and also John B. Walsh and divers and sundry citizens of the county of Kankakee aforesaid have presented to this board a petition that said county shall subscribe the sum of one hundred thousand dollars in the stock of said railroad company to aid in the construction thereof, and issue bonds of said county in payment thereof:

Now, therefore be it ordered and resolved that an election shall be held on the 14th day of June, A. D. 1869, by the qualified voters of the county of Kankakee and State of Illinois, in pursuance of the statute in such cases made and provided, to determine the question whether the county of Kankakee in said State of Illinois shall subscribe the sum of one hundred thousand dollars in the stock of the Kankakee and Illinois River Railroad Company, and issue bonds for that amount in payment of said subscription, payable in annual installments of ten thousand dollars, commencing in the year 1885, and annually thereafter until the full amount shall be paid, and bearing interest at a rate not

exceeding ten per cent. per annum, payable annually or semi-annually, and that said election shall be held at the usual places of holding town meeting and elections in the different towns in said county in conformity with the statute in such cases made and provided, and that due notice of said election shall be given by the supervisors of said county in accordance with law.

And be it further ordered and resolved that the said bonds, or the proceeds thereof, shall be applied to the construction of said road in the county of Kankakee, and that the board of supervisors reserve the right to control the application of said bonds or the proceeds thereof to the construction of said railroad in said county, and that a committee will hereafter be appointed by said board to carry out the directions, resolutions, and intentions of this resolution.

Mess. McGrew, Banfield, and others made remarks favoring the proposition for the county taking stock. Mr. Buck moved that the fore-
22 going resolutions be submitted separately, after the reading of which resulted in their adoption.

Messrs. Byrnes, Cotton, Gay, Little, Servis, Subrie, and Maillon in the negative on the first section of the resolution; and

Messrs. Byrnes, Cotton, Gay, Subrie, and Maillon voting in the negative on the second resolution.

Mr. Little offered the following; which was adopted:

Resolved, that should the Kankakee and Illinois River Railroad be built, the tax arising from the same be applied towards liquidating the bonds until they are paid.

Mr. Clark moved that when the board adjourn it adjourn until the 16th day of June next; carried.

Whereupon the board adjourned until Wednesday, the 16th day of June next.

That said board of supervisors met, pursuant to adjournment, on June 16, 1869, and canvassed the votes cast at the said election, and adopted the following report, to wit:

UNITED STATES OF AMERICA,
State of Illinois, County of Kankakee:

JUNE 16TH, A. D. 1869.

23 Board met pursuant to adjournment, Wednesday, June 16th, 1869, Mr. Mosier in the chair. Members present.

Upon call of roll all members answered to their names.

Committee appointed to canvass votes on subscription to stock in the Kankakee and Illinois River Railroad Company.

Mr. Buck presented the following; which was adopted:

Resolved, that Wm. F. Kenago, clerk of the county court, James Little and Geo. R. Letourneau, justices of the peace of Kankakee County, be, and are hereby, appointed a committee to canvass and report the result of a special election held June 14th, 1869, heretofore ordered by resolutions of this board.

Report of committee to canvass votes.

Your committee, heretofore appointed by this board, beg leave to re-
report that a special election was duly held in each of the different towns
of this county, at their usual place of holding elections, according
24 to law, on the 14th day of June, A. D. 1869, to decide whether
the county of Kankakee should subscribe one hundred thousand
dollars in the stock of the Kankakee and Illinois River Railroad Company, in pursuance of the resolutions of this board upon said question made at a special meeting of this board begun and held on the 6th day of May, A. D. 1869, reference to the same being hereby made to aid said railroad company in the construction of said railroad as mentioned in said resolution, and it satisfactorily appears that said election was held and conducted the same as required at all general elections in this State according to the statute, and that at said election 2,390 votes or ballots were cast "for subscription," and 379 votes or ballots were cast "against subscription," as shown by the official canvass of said votes, which canvass is in the words and figures following, to wit:

Abstract of votes given in the county of Kankakee, and State of Illinois, as to whether the county of Kankakee shall or shall not take one hundred thousand dollars of stock in the Kankakee and Illinois River Railroad Company in pursuance of a resolution of the
25 *board of supervisors, passed May 6th, 1869, at a special meeting of said board, at an election held in said county, on Monday the 14th day of June, one thousand eight hundred and sixty-nine.*

Towns.	Number of votes for subscription.	Number of votes against subscription.
Yellowhead	134	14
Sumner	86	.....
Manteur	32	97
Rockville	29	58
Momence	288	.....
Ganeer	234	.....
Bourbonais	153	4
Limestone	97	1
Salinr	81	1
Essex	35	67
St. Anne	32	55
Aroma	84	48
Otto	46	9
Pilot	129	1
Norton	67	22
Kankakee	863	2
Total	2,390 for	379 against

Poll-books opened and abstract made in our presence at the clerk's office at the city of Kankakee this sixteenth day of June, A. D. 1869.

JAMES LITTLE, *J. P.*
GEO. R. LETOURNEAU, *J. P.*

26 STATE OF ILLINOIS,
Kankakee County, ss:

Clerk's office, county court, June 16, 1869.

I, Wm. F. Kenaga, clerk of the county court within and for the county and State aforesaid, do certify that the foregoing is a correct statement of the

votes cast for the purpose therein set forth at an election held in the different towns in the county of Kankakee on Monday, June 14th, A. D. 1869.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Kankakee, this sixteenth day of June, A. D. 1869.

WM. F. KENAGA,
County Clerk.

Your committee further report that there is a majority of 2,011 votes of the qualified voters cast at said election in favor of said subscription, and also a majority of 552 votes, taking as a standard the number of votes cast at the last general election, which was 3,675, and that the judges
27 and clerks of said election in each of the different towns of this county have made due returns of said election to the said clerk. All of which is respectfully submitted.

WM. F. KENAGA,
JAMES LITTLE,
GEORGE R. LETOURNEAU,
Committee to Canvass Votes.

Upon motion the report of the committee was received and adopted.

That said board of supervisors after such canvass adopted also the following resolutions, to wit:

Resolution regulating the issuing of bonds.

Mr. Bonfield offered the following:

Whereas at a special election, duly held according to law, on the 14th day of June, A. D. 1869, in the county of Kankakee and State of Illinois, in pursuance of the resolutions of the board of supervisors of said county, made on the 6th day of May, A. D. 1869, a majority of the qualified voters of the county of Kankakee aforesaid, taking as a standard the vote cast at the last general election, voted for and in favor of said
28 county of Kankakee subscribing the sum of one hundred thousand dollars in the stock of the Kankakee and Illinois River Railroad Company, according to the statute in such cases made and provided; therefore, be it

Resolved, that said subscription of one hundred thousand dollars is hereby made in pursuance of said resolutions and of said election for the building of said railroad, subject to the conditions hereinafter mentioned.

That a committee of five persons be hereinafter appointed by the chairmen of this board, whose duty it shall be to direct the issuing of said bonds and protect the interest of said county, and discharging such other duties as they shall be directed by said board, and that the bonds of said county of Kankakee shall issue for the amount of said subscription which shall be paid to the railroad company at par in the payment of said subscription for stock; that said bonds shall be issued in sums of not less than five hundred dollars each, and payable the first installment of
29 ten thousand dollars *each and payable the first installment of ten thousand dollars* in the year 1885, and ten thousand dollars annually thereafter until the full amount of said loan of one hundred thou-

sand dollars shall be paid, and bearing interest at the rate of ten per cent. per annum, payable annually on the 1st day of July in each year, and that the clerk of the county court under the seal of said court shall execute in behalf of this county and issue said bonds to said railroad company when they shall have complied with the terms herein contained and upon the written order of said committee.

And the said bonds shall not be issued until said railroad company shall have made a bona fide contract with responsible parties for all necessary iron for said railroad, and shall have performed satisfactory arrangements to connect said railroad with some eastern terminus, and that said bonds shall be issued and delivered to said company as aforesaid upon
30 the written order of said committee as aforesaid in amounts of two thousand dollars per mile for each and every mile of said railroad through said county that shall be graded ready for the ties from time to time as fast as so graded, and the remainder of the amount of said subscription shall be paid to said company whenever they shall have completed said grading of said road through said county, or in sums of one thousand dollars for ever' 4,000 ties that they shall have then purchased as the grading shall have reached completion.

Be it further resolved, that this subscription is made subject to and under the condition that no further calls or assessments shall be made upon this county or upon the said subscription of stock over the amount so subscribed as aforesaid; and it is further provided that a majority of said committee may act and discharge the duties of said committee, and that said committee shall represent the board of supervisors of this
31 county in all meeting' of the stockholders and board of directors of said railroad company and cast the vote of said county according to the amount of said stock.

The yeas and nays being demanded, resulted in the unanimous adoption of the above preamble and resolutions.

That on said day said board also appointed the committee mentioned in said last resolution; that on September 16, 1869, at its annual meeting, said board received and ordered to be filed and placed on its records the following notice of the acceptance by said railroad of the county's subscription to its stock of $100,000 as aforesaid, to wit:

Acceptance of subscription to the capital stock of the Kankakee and Illinois River R. R. Co.

The clerk read the following notice of acceptance of the $100,000.00 stock to be subscribed by Kankakee County in the Kankakee and Illinois River Railroad:

To the chairman and hon. board of supervisors:

SIR: I have the honor to informe you that at a special meeting
32 of the board of directors of the Kankakee and Illinois River Railroad Company, held in this city on September 9, 1869, the subscription of one hundred thousand dollars, voted in aid of the construction of said railroad on the 14th day of June last, was accepted, and you are hereby notified of such acceptance.

JAMES McGREW,
Pres't K. and I. R. R. Co.

Upon motion of Mr. Bonfield, said notice of acceptance was received and ordered to be placed on record and filed.

That said board of supervisors, at a meeting duly held on June 1st, 1870, adopted the following resolutions, to wit:

(P. 16.) Mr. Buck offered the following, which was adopted:

Resolved, that the committee appointed by the board to issue the bonds of the county to the Kankakee and Illinois River Railroad Company be empowered to represent the interest of this county in the consolidation of the Kankakee and Illinois River Railroad Company with the Pacific
33 and Plymouth Railroad Company, Indiana, and that said committee be empowered to vote for the election of directors of the consolidated line, and that James McGrew be added to said committee.

Subscription to the K. and I. R. R. R. Co.

Mr. Buck offered the following, which was adopted:

Resolved, that the chairman of the board of supervisors of Kankakee County be, and is hereby, authorized to make the subscription of this county upon the books of said company, subject, however, to the conditions made in the call of said subscription, and the resolution passed by said report on the 16th day of June, A. D. 1869, as recorded in the supervisors' record of said county.

That on the 13th day of September, 1870, said board, at its annual meeting, adopted the following resolution, to wit:

Kankakee and Illinois River Railroad bonds.

Supervisor Richards offered the following, which was adopted:

Resolved, that the committee heretofore appointed by this board
34 to direct the issuing of the bonds of this county to the Kankakee and Illinois River Railroad Company are hereby authorized to order said bonds issued to said company upon more favorable terms, provided said committee are satisfied said road will be built, and that the issuing of said bonds will not be prejudicial to the interests of the county.

And that on November 10th, 1870, the following proceeding' were had before said board:

Kankakee and Illinois River Railroad Company.

Upon motion of Mr. Huling, the committee on county railroad bonds was requested to make report as to how the work on the road was progressing, and how many county bonds had been issued, and thereupon Thomas Bonfield, chairman, stated to the board that in pursuance of the original vote of the people and the authority of the board at the last session, the committee had ordered to be issued $50,000 of county bonds to the railroad company, and that the county clerk had received and
35 placed on file a like amount in stock of said company, and that the money secured from the sale of bonds was being applied in the construction of the road, and that the grading of would be completed from Dwight, Illinois, to the Indiana State line during the next two weeks, and

the piers for the bridge across the Kankakee River at this place would be completed within four weeks, and that the grading from Dwight to Bureau Junction was under contract, excepting a small portion; that Mr. Cass was at work grading the road through his lands in Indiana; which would enable the company to complete the road and have it in operation from Dwight, Illinois, to Plymouth, Indiana, by the middle of May or June next; that Mr. McGrew was then in the East perfecting some final arrangements with the Pennsylvania Central and Rock Island companies in regard to their part of the construction and operation of the road.

The clerk was then called upon to read the original resolution, which was submitted to the people of the county to vote upon in making
36 this subscription, which was found to be in conformity to the vote of the people and resolution of this board.

On July 8th, 1872, the following proceedings were had by said board of supervisors:

Mr. Dole stated that in compliance with the request of the board in June last, he had succeeded in making arrangements whereby the commissions have been reduced from ½ of 1 per cent. to ¼ of 1 per cent. for the paying in the city of New York of the interest on our county and town rail bonds.

Upon motion of Mr. Goodwin, the above verbal report was accepted.

And all of the above proceedings appear on the records of said board of supervisors.

Evidence was further introduced on the part of the plaintiff, tending to show that on Sept. 14, 1870, the said committee appointed by said board under its said resolutions of June 16th, 1869, made and delivered to Wm. K. Kenaga, the clerk of the county court of said county, and ex officio county clerk, the following order:

37 *Copy of order for the county clerk to issue county bonds.*

Whereas we are satisfied that the Kankakee and Illinois River Railroad Company have made satisfactory arrangements for the completion, running, and operating of its railroad and connection with the Chicago, Rock Island, and Pacific Railroad Company and Pittsburg and Fort Wayne Railroad, and whereas the construction of the road through Kankakee County has been placed under contract, requiring its completion ready for track-laying by the 15th day of November, A. D. 1870, and the issuing of the bonds of said county being necessary to aid the company to pay for said construction.

(On margin:) "Bonds # 61 to 85, inclusive, $25,000, issued, bearing date September 20, 1870."

Therefore it is ordered that the chairman of the board of supervisors of said county and clerk of said county shall sign the bonds to be issued by the county in aid of said company in building said road, and that $25,000.00 of them shall be delivered to the company by the 20th
38 day of September, A. D. 1870, and the remainder shall be issued and delivered to said company as ordered by the committee (which order was signed by all of the committee).

That pursuant to said order said William F. Kenaga delivered on September 20th, 1870, to said railroad company, the Kankakee and Illinois River Railroad Company, 25 of said bonds, of $1,000 each, with the said

coupons in suit annexed, the same being numbered from 61 to 85, both inclusive, and being the same bonds from which the coupons sued upon in this action, numbered 61 to 85, both inclusive, were detached, and received from the railroad company an equal amount of certificates of stock in said railroad company.

And that on Oct. 10, 1870, said committee also made and delivered to said clerk the following order:

"Issue and deliver to the Kankakee and Illinois River Railroad Company twenty-five thousand dollars of county bonds, and receive from said company an equal amount of the certificates of stock of said company."

(Signed by the committee.)

(On margin:) "Bonds # 36 to 60, inclusive, were issued, bearing date Oct 10, 1870, $25,000.00."

That pursuant to said order said Wm. F. Kenaga, the said clerk,
39 delivered on October 10th, 1870, to said railroad company, the Kankakee and Illinois River Railroad Company, 25 of said bonds of $1,000 # each, with the said coupons annexed, the same being numbered from 36 to 60, both inclusive, and received from the railroad company an equal amount of certificates of stock in said railroad company; that on Oct. 25, 1870, said committee also made and delivered to said clerk another order, as follows, to wit:

"Issue and deliver to the Plymouth, Kankakee and Pacific Railroad Company twenty-five thousand dollars of county bonds, and receive twenty-five thousand dollars in the stock of said company."

(Signed by the committee.)

(On margin:) "Bonds from 1 to 25, inclusive, were issued, dated October 25, 1870, $25,000.00."

That, pursuant to said last order, said clerk, on said Oct. 25, 1770, delivered to said Plymouth, Kankakee and Pacific Railroad Company 25 more of said bonds, $1,000 each, with the coupons annexed, numbered from 1 to 25, both inclusive, and received from said railroad company an equal amount in like certificates of stock in said company, the said com-
40 pany being the consolidation hereinafter mentioned.

And evidence was further introduced on the part of the plaintiff tending to show that on the 21st day of October, 1870, the said Kankakee and Illinois River Railroad Company was consolidated with the Plymouth, Kankakee and Pacific Railroad Company, a railroad corporation theretofore duly incorporated and organized under the laws of the State of Indiana, and that the consolidated companies took and acted under the name and title of the Plymouth, Kankakee and Pacific Railroad Company; that said consolidation was made and completed with the consent of said board of supervisors of Kankakee County, in conformity with and under the authority of the aforesaid act incorporating said Kankakee and Illinois River Railroad Company, the general statutes of the State of Illinois authorizing such consolidations, and the general laws of the State of Indiana of like nature. Also, that said bonds and coupons, numbered from 36 to 60, both inclusive, and 61 to 85, both inclusive, were deliv-
41 ered to said Kankakee and Illinois River Railroad Company be-

fore the said consolidation of said railroad companies was made; and that said bonds and coupons, numbered from 1 to 25, were delivered to said consolidation, the Plymouth, Kankakee and Pacific Railroad Company, after said consolidation was completed.

And evidence was further introduced on the part of the plaintiff tending to show that said board of supervisors levied and collected taxes on the taxable property in said county for the years 1871, 1872, 1873, 1875, 1876, 1877, and 1878, for the purpose of paying the an'ual interest on said bonds. For the year 1874 the board borrowed the money to pay the interest for that year. The taxes levied as aforesaid were applied by said board in the payment of the annual interest on the bonds issued to said railroad company as .

And evidence was further introduced on the part of the plaintiff tending to show that the county of Kankakee, on April 5th, in the year
42 1853, lawfully adopted the township organization law of said State, so called, then in force, and that it hath from thence acted under and been governed by the township organization laws *laws* of said State.

The plaintiff thereupon rested its case upon the foregoing evidence. And thereupon the defendant .then and there, by its counsel, moved the court to hold, under the acts of the legislature of the State of Illinois, and the facts in evidence, as aforesaid, that the said plaintiff had failed to show legal and valid authority for the issue of said bonds and coupons, or either of them; and that the said bonds and coupons, or either of them, were and are illegally issued and void in the hands of the plaintiff, conceding that the latter had bought the same in open market before their maturity for valuable consideration and without actual notice of any defence thereto.

But, nevertheless, the court then and there, after considering the said questions, did rule each of them against the said defendant, and did then and there hold that the said bonds and coupons, and every of
43 them, were duly and lawfully issued under and in accordance with proper and lawful authority; and also that the said bonds and the coupons sued upon were legal and valid for the amount thereof, with interest, in the hands of the said plantiff; to which several rulings the said defendant did then and there duly and severally except, which said exceptions were then and there allowed by the court to its findings and conclusions aforesaid; whereupon the court did then and there find for the said plaintiff, and did thereupon (there being no objection in reference to the computation of the amount alleged to be due) assess the plaintiff's damages at the sum of five thousand five hundred and twenty-five dollars, for which the said court did then and there give judgment, &c.

And forasmuch as the matters aforesaid do not appear of record, the undersigned hath on the application of said defendant signed and sealed this bill of exceptions.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Oct. 4, 1882. Wm. H. Bradley, clerk.

44 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the

proceedings had in said court in said entitled cause, wherein the Aetna Life Insurance Company is the plaintiff and The County of Kankakee is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this fourth day of October, A. D. 1882.

[SEAL.] WM. H. BRADLEY, *Clerk.*

45 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between The Aetna Life Insurance Company, plaintiff, and The County of Kankakee, defendant, in an action of assumpsit a manifest error hath happened, to the great damage of the said The County of Kankakee, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October, A. D. 1882, in the Supreme Court then and there being held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twentieth day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the seventh year.

[SEAL.] WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

(Indorsed:) Supreme Court of the United States. The County of Kankakee, plaintiff in error, vs. The Aetna Life Insurance Co., defendant in error. Writ of error.

Citation.

United States of America to the Aetna Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the third Monday in, October inst., pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The County of Kankakee is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Henry W. Blodgett, sitting as Circuit Judge in and for said district, this twentieth day of October, in the year of our Lord one thousand eight hundred and eighty-two.

H. W. BLODGETT, *Judge.*

47 Due service of the within citation is hereby admitted this 20th day of October, 1882.

GEORGE O. IDE,
Attorney for Def't in Error.

(Indorsed:) Circuit court of the United States. County of Kankukee vs. Aetna Life Insurance Company. Citation. F. H. Kales att'y for pl'ff in error.

(Indorsement on cover:) No. 1146. The County of Kankakee plaintiff in error, vs. The Ætna Life Insurance Company. N. Illinois C. C. U. S. Filed 6th November, 1882.

16-1668

OFFICE SUPREME COURT U.S.
FILED
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

THE COUNTY OF KANKAKEE,
Plaintiff in Error,
v.
THE ÆTNA LIFE INSURANCE COMPANY.

Error to the Circuit Court of the U. S. for the Northern District of Illinois.

No. 1146.

BRIEF FOR PLAINTIFF IN ERROR.

FRANCIS H. KALES,
Of Counsel.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, NOS. 47 AND 49 DEARBORN STREET.
1882.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

THE COUNTY OF KANKAKEE, *Plaintiff in Error,* v. THE ÆTNA LIFE INSURANCE COMPANY.	*Error to the Circuit Court of the U. S. for the Northern District of Illinois.* **No. 1146.**

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

In September, 1881, the defendant in error brought suit in the court below, to recover on certain defaulted interest coupons. These coupons, together with the bonds from which they were detached, purport to be executed by the supervisors of the county of Kankakee, in the State of Illinois, to pay a subscription made by that county to the capital stock of the Kankakee and Illinois River Railroad Company, to the amount of one hundred thousand dollars. Rec. pp. 6-7. The bonds recite that they were issued pursuant to the orders of the board of supervisors of Kankakee county, "as au-"thorized by virtue of the laws of the State of Illi-"nois, authorizing cities and counties to subscribe "capital stock to aid and construct railroads," etc.

Afterward the cause was tried by the court, a jury being by stipulation waived by both parties, and on the conclusion of the evidence offered by the plaintiff, the defendant moved the court to hold under the Acts of the Legislature of the State of Illinois, and upon the facts in evidence, that the plaintiff had failed to show legal and valid authority for the issue of said bonds and coupons; and that the bonds and coupons were illegally issued and void in the hands of the plaintiff, conceding that the plaintiff had bought the same in open market, before their maturity, for valuable consideration and without actual notice of any defense thereto; but the court ruled otherwise and held the said bonds and coupons were duly and lawfully issued, under and in accordance with proper and lawful authority. To this ruling the defendant excepted, and there being no further evidence, judgment was rendered against the defendant for $5,525. And thereupon the defendant sued out a writ of error to bring the case to this court.

The plaintiff in error now assigns the following errors, namely:

1. That the court below erred in holding that either the bonds or the said coupons attached thereto, were legal and valid.

2. That said court erred in holding that the plaintiff below had shown legal and valid authority for the issue of said bonds and coupons, or either of them.

The Acts of the Legislature of the State of Illinois, which have a bearing upon the question, whether the bonds and coupons referred to were issued under and in pursuance of proper and lawful authority, are, so far as the same are thought to be material, the following:

CHARTER OF RAILROAD COMPANY.

THE CHARTER OF THE KANKAKEE AND ILLINOIS RIVER RAILROAD COMPANY, IN FORCE APRIL 15, 1869, PROVIDES:

"§ 16. To further aid in the construction of said "railroad, townships, corporate towns and cities on "or along the line of said railroad may subscribe to "the capital stock of said company in sums not ex- "ceeding one hundred thousand dollars, respective- "ly. But no such subscription shall be made until "the same shall be submitted to the legal voters "thereof; and the clerk thereof, if any, and if no "such clerk, then the county clerk, upon the pres- "entation of a petition, signed by at least ten citi- "zens, who are legal voters of the territory of the "proposed subscription, stating the amount of "the proposed subscription, shall cause to "be posted notices in at least three of "the public places in such territory "thirty days before such election, notifying the le- "gal voters of such territory to meet at the usual "place of holding elections therein, or if none, or if "otherwise deemed proper, at some other conven- "ient place, for the purpose of voting for or against "such subscription; and if it appear that a major- "ity of all voters have voted 'For Subscription' it "shall be the duty of the Supervisors, respectively, "of said corporate towns or townships, or such "clerks, for and in behalf of the town or townships "and cities, that shall have voted said subscription, "to subscribe to the capital stock of said railroad "company the amount so voted to be subscribed, "and to receive from said company the proper cer- "tificates therefor; and he shall execute to said com- "pany, in the name of said towns, townships, cit- "ies, bonds bearing interest not to exceed ten per "cent. per annum, which bonds shall run not less than "ten years and not to exceed twenty-five years, and

"the interest upon the same shall be made payable "annually; and the said bonds shall be delivered "to the president or secretary of said railroad com- "pany, for the use of said company; and said "bonds shall be a pledge upon the revenue of such "territories, respectively. Said elections shall be "held and conducted according to the laws of such "cities or corporate towns and township elections "under the township organization laws, and the "results shall be certified to the county clerk and "be by him recorded, and shall be evidence of the "facts therein contained. Nothing herein shall "prevent said corporate towns, cities and townships "from levying said subscription, with such interest "thereon, in five installments of annual taxation, "and collect the same with their annual taxes: "*Provided*, the same does not exceed five per cent. "upon the amount of the taxable property thereof. "It shall be the duty of the county clerk, annually "thereafter, to complete and assess upon all taxable "property returned by the assessor of each of said "corporate towns and townships, which have voted "to subscribe a sufficient sum to pay the interest "on all bonds issued by the respective towns, which "tax shall be extended upon the collector's books as "other taxes are, and shall be collected in the same "manner that other taxes are collected, and, when "collected, shall be paid into the county treasury "as county taxes are paid.

"§ 17. It shall be the duty of the treasurer of "said county to pay out, on the presentation to "him of the bonds issued by any towns, as afore- "said, the amount due upon each of said bonds as "interest, out of any money in his hands for that "purpose, and indorse the payment upon said bonds "or take such voucher as he may prescribe. He "shall, also, keep an account with each town of any "money received by him and paid on account of "said towns, which account shall at all times be "open to inspection by all persons wishing to exam- "ine the same; and nothing herein contained shall

"prevent counties and cities from taking and voting "for subscriptions in the stock of said company, "under the general laws of this State."

An Act supplemental to an Act entitled "An Act to provide for a General System of Railroad Incorporations."

[Approved Nov. 6, 1849. Laws, 1849, (2nd Sess.) p. 33.]

SEC. 1. That whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this State, such city or county may, and are hereby authorized, to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000, for each of such cities or counties; and the stock so subscribed for or purchased shall be under the control of the County Court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

SEC. 2. That for the payment of said stock, the judges of the County Court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding ten per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal, or if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county, making such subscription to be drawn for that purchase in sums not less than fifty dollars, bearing interest not exceeding ten per centum per annum: *Provided*, That no bond shall be paid out at a rate less than par value.

SEC. 3. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital

stock of such company, at par, and in lieu of cash, and to issue their bonds, bearing interest not exceeding 10 per cent. per annum, for any moneys by them borrowed for the construction for their railroad and fixtures, or for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

SEC. 4. No subscription shall be made, or purchase or bond issued by any county or city under the provisions of this act whereby any debt shall be created by said judges of the County Court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers) shall vote for the same; and the judges of the County Court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least 30 days' notice, in the same manner as notices are given for election of State or county officers in said counties, requiring said electors of said counties or said cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which such loan is to be effected; and the opinion of the electors shall be expressed upon their ballots "for subscription," or "against subscription," and counted and returned by the judges and clerks of elections, as in other cases; and if a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of

the same, such authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act is held upon a day of a general election, then the number of votes thrown at such general election for county officers shall be the standard of the number of qualified voters as aforesaid. No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.

An Act to facilitate the construction of Railroads.
[Approved March 1, 1854. Laws, 1854, p. 11.]

SEC. 1. That any city or county in this State, which under the provisions of an Act entitled "an Act supplemental to an Act entitled 'an Act to provide for a general system of railroad incorporations,' approved Nov. 5, 1849," has heretofore subscribed, or may hereafter subscribe for stock in any railroad company, payable in the bonds of said city or county, it shall be lawful for the city council of such city, or the judges of such county, and they are hereby authorized and empowered to issue and deliver to such railroad company the whole or any portion of the bonds of such city or county, payable on such subscription at any time hereafter, when in their opinion the interest of such city or county will be promoted thereby, whether the assessments upon the stockholders of said company have been regularly assessed and made payable or not.

An Act to provide for Township Organization.
[Approved Feb. 17, 1851. Laws, 1851, p. 35.]

By Art. 16, Sec. 4 of the above act, the powers of the board of supervisors are declared to be as follows:

The board of supervisors of each county in this State shall have power at their annual meetings, or at any other meeting:

1st. To make all such orders concerning the corporate property of the county as they may deem expedient.

2d. To audit all accounts chargeable against such county, and to direct the raising of such sums as may be necessary to defray the same.

3d. To audit the accounts of town officers and other persons against their respective towns, as are not otherwise by law provided for; and to direct the raising of such sums as may be necessary to defray the same.

4th. To appropriate funds to aid in the construction of roads and bridges in any part of their respective counties, whenever a majority of the whole board of the county may deem it proper and expedient.

5th. To perform all other duties not inconsistent with this act, which may be required of or enjoined on them by any law of this State to the County Courts.

TAXATION.

Laws, 1863, p. 41, 16th Feb. § 1. TAXATION TO PAY COUNTY INDEBTEDNESS.] The County Courts for county business, in counties without township organization, and the board of supervisors of counties under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent. upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes; and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said County Court or board of supervisors, as the case may be, in liquidation of such indebtedness.

☞*The Act of April 16, 1869, referred to in the Bonds is omitted, as nothing was done under it, and it has been treated as having no bearing.*

Under the decisions of this court, the general questions now open for discussion, are:

1. Was there a total want of authority in the municipal officers of the county of Kankakee to issue the bonds to which the coupons in question were attached? And

2. If there was authority to issue these bonds, was it conditional? And if so, was there a failure to observe precedent conditions necessary to the exercise of the power to issue bonds?

POINTS.

I.

THERE WAS A TOTAL WANT OF AUTHORITY IN THE MUNICIPAL OFFICERS OF THE COUNTY OF KANKAKEE TO ISSUE THE BONDS TO WHICH THE COUPONS IN QUESTION WERE ATTACHED.

Charter of Kank. and Ill., &c., R. R. Co., Secs. 16–17, ante, p. 3–5.

General Law Nov. 6, 1849, relative to railroad subscriptions, &c., ante, p. 5.

Law Amendatory, &c., approved March 1, 1854, ante, p. 7.

Broom's Leg. Max. (7th Ed.), 664–5.

Wells v. *Supervisors*, 102 U. S. 625.

Mayor v. *Ray*, 19 Wallace, 468.

Gaddis v. *Richland County*, 92 Ill. 119.

II.

THE POWER TO ISSUE BONDS, IF IT CAN BE HELD THERE WAS ANY, WAS CONDITIONAL, AND THE CONDITIONS WERE PART OF THE POWER CONFERRED.

The conditions were, (1) that the bonds should be authorized by a majority vote at an election duly called; the statute expressly declaring that no bond should be issued unless a majority of the qualified voters, &c., should vote for the same; and (2), that the election should be called by the proper corporate authorities, and (3), that the bonds should be issued by the proper corporate authorities of the county.

Sec. 4 of General Law, Nov. 6, 1849, ante, p. 6.

Act of March, 1854. Amendatory, &c., ante, p. 7.

Marshall County v. *Cook*, 38 Ill., 44.

Daw v. *Met. Board*, 12 C. B. (N. S.) 161.

Gaddis v. *Richland County*, supra.

Township of E. Oakland v. *Skinner*, 94 U. S., 255–8.

County of Jasper v. *Ballou*, 103 U. S. p. 750.

Supervisors Schuyler County v. *People*, 25 Ill. 181.

Marsh v. *Fulton County*, 10 Wallace, 671.

Loan Association v. *Topeka*, 20 Wallace, 656.

ARGUMENT.

FIRST. There was in this case a total want of authority in the municipal officers of the county to issue the bonds to which the coupons in question were attached.

By the act of incorporation of the Kankakee and Illinois River Railroad Company, in force April 15, 1869, it was declared (Section 16) that to further aid in the construction of said railroad, "*townships, corporate towns and cities,*" on or along the line of said railroad, might subscribe to its capital stock; but that no such subscription should be made until the same should be submitted to the legal voters thereof; and, if the vote was favorable, it was made the duty of the respective supervisors of such towns or townships, or the clerks thereof, and of cities, to subscribe to the capital stock of such railroad company the amount voted, and to receive from the company the proper certificates therefor, and to execute to the company, "in the name of said towns, townships, cities," bonds bearing interest, &c., which bonds, it is declared, shall be delivered to the president or secretary of said railroad company for its use.

Thus it will be observed that special provision was made as to the kinds of municipal corporations authorized both to subscribe to capital stock, and also to issue bonds in payment of subscriptions. In the enumeration so made in section 16, where both powers are conferred, *counties* are not named, and they must be considered as omitted by way of *exclusion.* Broom's Leg. Max., (7th Ed.), 664–5. But at that time the general law of November 6, 1849

was in force and by its terms, counties were authorized both to subscribe for stock and also to issue bonds in payment thereof. In view of this provision of the general law, it was declared in section 17 of the charter "that nothing herein contained shall "prevent *counties* and cities *from taking and voting* "*for subscriptions* in the stock of said company under "the general laws of this State." It will be seen that in this provision only the power *to subscribe* is mentioned, while the power to issue bonds is omitted as to counties; and this omission, must, in like manner, be considered to be by way of exclusion of the power to issue bonds or borrow money, as provided might be done by the general law.

This is evident from sections 16 and 17 of the company's charter, when read in connection with the general laws therein referred to.

The meaning is this: The charter having expressly authorized cities, towns, etc., to subscribe for stock in this railroad, and to issue bonds; and having omitted *counties* from the list of subscribers who were to issue bonds; still it is declared that counties shall not be considered as deprived of the power *to subscribe* to the capital stock under the general laws; while the power to issue bonds or borrow money to pay the subscription is withheld, so that the debt shall be paid by taxation and not by the issuing of municipal obligations.

It seems clear that the power to subscribe for capital stock, and the power to borrow money or issue bonds, are two distinct and separate powers. This is indeed recognized by this court in the case of *Wells* v. *Supervisors*, 102 U. S. 625.

Considering these two powers to be separate, it would seem that the concluding clause of section 17,

of the company's charter, so far as this railroad is concerned, left to counties, under the general law, only the power to subscribe for and take stock, if the majority so voted. This conclusion and the mode of interpretation employed to reach it, are, it seems to me, fully sustained by the decisions of this court on kindred questions.

The general principle here applicable is, that a special provision as to a particular subject-matter, is to be preferred to general language which might have governed in the absence of such special legislation. "*Generalia specialibus non derogant. Specialia generalibus derogant.*"

To apply this maxim to the present case, it would seem that sections 16 and 17 of the charter of the railroad corporation in question must be considered as taking the matter of municipal subscriptions and the issuing of bonds out of the general law, and thus limiting such subscriptions and the issue of bonds to the kind of municipal corporations named in the charter, excepting *in so far* as the general law is in terms saved by reference thereto in section 17.

It has often been declared by this court that municipal corporations possess only those powers expressly granted, or such as by a reasonable or necessary implication are incident to those granted.

Wells v. *Supervisors*, 102 U. S. 625.
Mayor v. *Ray*, 19 Wallace, 468.

The same doctrine is held by the Supreme Court of Illinois in *Gaddis* v. *Richland County*, 92 Ill. 123.

In the case last cited the court say : " All will " concede that a municipality can only exercise the " powers conferred by the charter of their organiza-

"tion, and such powers must be by express grant or "such as follow by reasonable implication as neces- "sary to perform duties imposed or privileges con- "ferred, and the means of their accomplishment "are not specified. This being a fundamental "rule, it follows that the power to create a "debt by a county or to subscribe to stock in "a railroad, *or to issue bonds* to raise money to aid "in its construction, must be conferred by grant "from the law-making power, and when the grant "is made and the power is conferred, it must be "substantially pursued. If a particular mode is "prescribed the municipality can not adopt a dif- "ferent mode, and if the power is conferred on one "set of officials or individuals, it can not act "through or by a different set of officials or persons. "The municipality have no discretion in executing "the power, nor can they adopt a mode they deem "better adapted to accomplish the end. The "General Assembly had the power to confer "the authority or to withhold it, or, in conferring "it, to impose such terms and conditions as they "chose. It was an exercise of power by them in "the government of the State, and that body were "the sole judges as to the manner in which the "power should be exercised, and the functionaries "or individuals who should exercise it.

In *Mayor* v. *Ray*, *supra*, this court must be taken to have held that municipal corporations have no inherent or implied power to borrow money or to issue bonds for municipal purposes; and the case of *Wells* v. *Supervisors*, *supra*, is authority for the same doctrine.

It is not denied but that the authority to issue bonds or other negotiable instruments may be im-

plied from the power to borrow money where that power is given, either expressly, or by clear implication.

But such is not the case here. No power is granted to the county of Kankakee to issue bonds to pay subscriptions to the capital stock of this railroad company. Nor does a power to subscribe to capital stock contain or imply the additional power of *borrowing* money to pay the subscription, nor the power to issue negotiable securities for that purpose. On the other hand, the implication from the power to subscribe is, that the county shall cause the proper levy of taxes to be made in order to discharge the debt thus created.

Wells v. *Supervisors, supra.*

In cases like this, the distinction between an indebtedness created by a mere subscription, and one created by a negotiable instrument becomes material. If bonds be authorized, all the defences of the county against paying its subscription, are cut off by their sale to *bona fide* purchasers without notice; while on the contrary, if the debt of the county consists of a mere *promise* or written subscription, the county may interpose important defences, when suit is brought as it then must be (if at all) by the railroad company, to recover the amount subscribed. Nor can such defences be considered inequitable; for, if the county has no defence against the railroad company, the holder of these bonds, may, no doubt, be subrogated to all the rights of the company in reference to the subscription.

From this point of view it appears how very material it was to the county that its corporate authorities should not possess the power of putting its indebtedness for this subscription into the form of

negotiable instruments. Nor, in the absence of express power, ought the authority to do so to be implied, unless the implication be clear and undoubted.

SECONDLY. If it could be held that the county of Kankakee was authorized by law to issue bonds in payment of its subscription, as well as to subscribe to the capital stock of this railroad, still the authority was *conditional.* The general law (Sec. 4, *supra*) forbade the issuing of any bonds until a majority of the qualified voters of the county had voted for the same at an election called in pursuance of law.

1. In the present case the election was called by the board of supervisors, and a majority of those voting, etc., being in favor of the proposition to subscribe and issue bonds, the bonds themselves, as appears on their face, were issued by the board, and the questions here are, whether the authority *to issue and deliver* the bonds was in the board itself, or in the judges of the County Court; and also, whether the authority to call the election, was in the board of supervisors or in the judges of the County Court.

By the general law of November 6, 1849, (sec. 4) the authority both to call the election and to issue the bonds, was vested in the judges of the County Court. Subsequently, in 1853, Kankakee county was organized under the township organization law of the State, which transferred, in such cases, the powers exercised by the County Court to the board of supervisors. *Marshall County* v. *Cook*, 38 Ill. 44. But afterward, in 1854, the general law was amended by an Act entitled "An Act to facilitate the construction of railroads," approved March 1

1854 (Laws, 1854, p. 11), and set forth above, by which the power to *issue and deliver* such bonds was restored to the judges of each county, without discrimination as to whether the county had been organized under the township organization law or not. And so the law remained at the time of the issue of the bonds in question, in September, 1870.

It may be contended that the Amendatory Act of 1854 conferred upon the judges of the County Court merely a *concurrent* power, not inconsistent with the like power in the board of supervisors. But the amendatory act seems to exclude that hypothesis. Its language on this point is: "It shall be lawful for "* * * the judges of such county, and they are "hereby authorized and empowered to issue and "deliver to such railroad company, the whole or "any portion of the bonds, * * *at any time here-"after*," etc.

A concurrent power in the board of supervisors is inconsistent with a like power to the county judges, to be exercised by them at any time; for it is evident that the judges of the County Court could not "*at any time*," etc., issue and deliver to the railroad company the bonds voted, if the supervisors had already done so.

Daw v. *Met. Board*, 12 C. B. (N. S.) 161.

The principle here is, that where the same power is given by different statutes to different public bodies, and the power can not, consistently with the object of the legislation, be exercised by both, the later statute will prevail.

If then the authority to issue and deliver the bonds, if any could be issued, was, by law, vested still it in the judges of the County Court by the law of 1854, ~~but~~ was, as these bonds on their face show,

exercised by the board of supervisors; and, if the latter body was not authorized by law to issue and deliver the same, the bonds on their face are void; *Gaddis* v. *Richland County, supra;* where it is said: "If a particular mode is prescribed, the municipal-"ity can not adopt a different mode; and if the "power is conferred on one set of officials or indi-"viduals, it can not act by or through a different set "of officials or persons."

But it may be claimed by the counsel for the defendant in error that if the bonds were to be issued it is immaterial by what corporate authority they were in fact issued and delivered to the railroad company. To this it is answered that the legislative will on this subject must govern. But it can be readily seen that lodging the power to issue and deliver the bonds in the judges of the County Court would operate as a check upon the political body known as the board of supervisors; and the power being with the judges that the bonds might not be delivered until the railroad company itself had become entitled to receive them. In other words, there might be no issue of bonds to which there might be defences between the parties, but which a sale and transfer by the railroad company to a *bona fide* purchaser would cut off. For example, in this case (Rec. p. 9) it appears that the board of supervisors intended that the bonds or the proceeds thereof should be applied to the construction of the railroad in question *in the county of Kankakee;* and that the board of supervisors were to reserve the right to control the application of the bonds or the proceeds thereof to the construction of the railroad in that county, and intended to provide a committee to carry out the directions and inten-

tions of the resolution of the board on that subject. But were negotiable bonds to be issued and be delivered to the railroad company *at any time* when, in the judgment of the judges, the county would be benefited as provided by the act of 1854; it follows that the judges of the County Court in making such issue and delivery would only have done so as provided by that Act, "*when in their opinion the interests of the county would be promoted thereby.*" But it does not follow that their opinion on that subject would have been the same as the opinion of the political body or board of supervisors.

So that the particular corporate authority of the county designated by law to issue and deliver these bonds was material; and therefore the exercise of that authority by the designated body was essential to the validity of these bonds and coupons.

2. It has been conceded thus far, for the sake of argument, that the election in question was called by the proper corporate authority; but, as said in *Gaddis* v. *Richland County*, (p. 122), "The act of "1849 referred to, only confers power on county "courts to call elections and subscribe for stock. "If the power may be exercised under that act by "the board of supervisors in counties afterward act- "ing under township organization, it would not ap- "ply to counties so organized when the authority *is* "*specifically conferred on the County Court.*"

Now what was the case here? The special charter of this company, granted April 15, 1869, by the frame thereof in permitting *some* municipal corporations to subscribe and issue bonds, *but not naming counties, excluded* counties ~~from issuing bonds~~; but by the 17th section of the charter, the general law of the State was, as before said, so far adopted as to

but not to issue bonds

permit counties "*to subscribe*", in accordance with the general laws of the State. And it would seem that by the last clause of section 17 of the charter, section 4 of the general law of 1849, so far as the same relates to *subscriptions*, was adopted the same as if it had been *in ipsissimis verbis* incorporated into said section 17. *Verba relata in esse videntur.*

If that be so, then in 1869 the Legislature, as respects calling an election to vote for subscriptions to this particular railroad, required that the election should be called by the judges of the County Court. The record in the present case shows that the election was not thus called; but, on the contrary, that it was called by the board of supervisors.

It would seem, therefore, that no power was possessed by any of the corporate authorities of the county of Kankakee *to issue bonds* in payment of any subscription which might have been made to the stock of the railroad company.

Township of E. Oakland v. *Skinner*, 94 U. S. 255–8.
Gaddis v. *Richland County*, 92 Ill. 119.
County of Jasper v. *Ballou*, 103 U. S. p. 750.
Supervisors of Schuyler County v. *People*, 25 Ill. 181.

As said by this court, in *Jasper County* v. *Ballou*, "The election was called by the wrong corporate "agency. The court should have brought the peo- "ple together, and not the supervisors. This, if "there had been nothing more, would, under the "ruling of the highest court of the State (Illinois "made long before the vote was taken, render the "bonds invalid." And so in this case, the same rul-

ing on this point was made by that court long before the vote was taken.

3. It appears by the record (p. 16) that the board of supervisors levied and collected taxes for certain years to pay interest on the bonds in question, but whether this was voluntary or not does not appear, and it may be claimed that this operated to ratify the issue of the bonds in question; or to estop the county from questioning their validity.

But this principle does not apply where bonds are void in their inception for want of authority to issue them, or where they have been issued by a corporate body, or its agents, who were not authorized by law to issue the same.

Marsh v. *Fulton County*, 10 Wallace, 677.
Loan Association v. *Topeka*, 20 Wallace, 656.

In conclusion, if the bonds were void in their inception, either because there was no law whatever to authorize the county to issue such bonds; or because they were issued by the wrong corporate agency; or because the pre-requisite election to ascertain the popular will was called by the wrong corporate authority, the defendant in error can not be considered a *bona fide* holder; nor can he, in such a case, recover on the bonds, although the defenses, if any, which might be urged against the railroad company, have not, as against him, been brought forward. As said in *Township, &c.*, v. *Skinner*, 94 U. S. 558, where there is a total want of authority to issue bonds there can be no such thing as a *bona fide* holder.

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